In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-451

PATRICIA LOU KENNEDY, ET AL., PETITIONERS

v.

BUREAU OF NARCOTICS AND DANGEROUS DRUGS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Congress has designated peyote as a "controlled substance" subject to restrictions on manufacture, distribution, and possession under the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 84 Stat. 1236. (21 U.S.C. 812(c), Schedule I(c)(12)). Similar restrictions had previously been applied to peyote by regulation of the Bureau of Narcotics and Dangerous Drugs, pursuant to the Drug Abuse Control Amendments of 1965. The Bureau has, by regulation, made the restrictions on peyote inapplicable "to the non-drug use of peyote in bona fide religious ceremonies of the Native American Church" (21 C.F.R. 307.31; Pet. App. A40), a religious organization of American Indians. This proceeding arises from a petition by the

Church of the Awakening and certain of its individual members, non-Indians, to extend the exemption to include the Church of the Awakening.

Following an extensive hearing and the issuance of a hearing officer's report containing detailed findings of fact and conclusions (Pet. App. A11–A32), the Director of the Bureau of Narcotics and Dangerous Drugs denied the petition of the Church of the Awakening. This decision was based on detailed findings regarding the potential physiological and psychological dangers inherent in the use of peyote and the absence of any current approved medical use of the drug (Pet. App. A19–A22), as well as findings regarding the organization of the Church of the Awakening and the manner in which it proposed to make the drug available for use by its members (Pet. App. A23–A26). The Director concluded that the governmental interest in fostering the public health and welfare by curbing the use of a drug "with a potential for abuse because of its hallucinogenic effect" (Pet. App. A28) outweighed the interest of the Church in being able to use the drug in connection with the practice of its religion. The denial of the petition was found to be justified, notwithstanding the existence of an exemption for the Native American Church, on the ground that membership in the latter church is limited to Indians, who for historical reasons may constitutionally be afforded different treatment in matters of religious practice than other persons, and on the further ground that the use of peyote is essential to the very existence of the Native American Church, but not to the present applicants, so that

the impact of a governmental prohibition in the present instance would not be so severe as to outweigh the public health and welfare considerations underlying the prohibition (Pet. App. A28–A29).

On appeal, the court of appeals affirmed the Director's refusal to exempt the Church of the Awakening (Pet. App. A35–A39). Petitioners attack the decision below on two grounds: First, they assert that they have a constitutionally protected right under the Free Exercise Clause to religious use of the drug; second, they contend that the government cannot constitutionally exempt the Native American Church while withholding a similar exemption from the Church of the Awakening.

1. This case does not involve a challenge to the government's general right to regulate and restrict the use of peyote. Petitioners concede that "[p]eyote is potentially dangerous to society" and that the government has an interest in stemming "illicit and dangerous usage" of the drug (Pet. 14).

2. The First Amendment does not prohibit Congress from regulating the manufacture, distribution, and possession of peyote and other hallucinogenic drugs and from applying such regulation to persons who seek to use the drugs for allegedly religious purposes in the same manner as it is applied to those whose use is motivated by other considerations. See *Leary* v. *United States,* 383 F. 2d 851, 859–862 (C.A. 5), certiorari denied as to this issue, 392 U.S. 903, reversed on other grounds, 395 U.S. 6; *United States* v. *Hudson,* 431 F. 2d 468, 469 (C.A. 5), certiorari denied, 400 U.S. 1011; *United States* v. *Kuch,* 288 F. Supp. 439,

445 (D.D.C.). As stated by this Court, religious freedom "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303–304. See also *Braunfeld* v. *Brown*, 366 U.S. 599; *Reynolds* v. *United States*, 98 U.S. 145. In the instant case, refusal of the exemption in no way inhibits petitioners' religious beliefs; rather, it prohibits conduct found by Congress to be inimical to the overriding public interest.[1]

3. Petitioners contend that, in enacting the Drug Abuse Control Amendments of 1965, "Congress recognized religious use of peyote as a practice protected by the free exercise clause" (Pet. 13). This assertion is predicated upon certain ambiguous legislative history. The House version of the bill originally contained a specific exemption of peyote "insofar as its use is in connection with the ceremonies of a bona fide religious organization" (Pet. App. A1). The Senate deleted this provision. Concurrence by the House in the Senate's action appears to have been predi-

[1] *Sherbert* v. *Verner*, 374 U.S. 398, does not aid petitioners. There the Court found no "compelling state interest" in disqualifying that petitioner from unemployment benefits because her religious beliefs prohibited work on Saturdays. Here, however, Congress has shown grave concern with respect to the use of various potentially dangerous drugs, including peyote. This compelling governmental concern is adequate to negate petitioners' assertion of a right to use peyote as an aid to the practice of their religion—especially in light of the unchallenged finding that such use is not essential to the practice of the religion (Specialized Finding of Fact 22, Pet. App. A26).

cated, at least in part, on the view expressed by the Commissioner of Food and Drugs (who was given the initial responsibility of enforcing the legislation) that the bill, "even without the peyote exemption * * * cannot forbid bona fide religious use of peyote" (Pet. App. A3). As shown above, this view is, as a constitutional proposition, incorrect, and its expression by the Commissioner cannot be considered binding upon the government. Nor does the foregoing history justify interpretation of the statute as requiring exemption of all religious uses of peyote. The language that would have required this result was specifically stricken from the bill by the Senate, with the concurrence of the House, and there is no evidence that the Senate intended such a sweeping exception to be carved out. It would be improper to read the deleted language into the statute in the absence of evidence that both Houses of Congress entertained such an intention; if anything, the history of this legislation suggests the opposite conclusion.[1]

4. The remaining issue concerns the lawfulness of refusing an exemption to the Church of the Awakening while continuing to exempt the Native Ameri-

[1] It is clear, moreover, that the concern that motivated the proposed language in the House bill and that underlay the Commissioner's letter was prompted by what was seen at the time as a unique practice of the North American Church (predecessor to the Native American Church). Whatever may be inferred regarding congressional solicitude for the religious practices of Indians, there is little warrant for extending the inference to encompass then-unknown non-Indian groups such as that of petitioners (Pet. App. A2-A5).

can Church. Petitioners contend that such action constitutes an establishment of the Native American Church and is invalid for that reason (Pet. 15). The concurring opinion in the court of appeals stated what we believe to be the correct view—that the special treatment of the Native American Church has a rational basis and an historical justification and provides no grounds for complaint by others (Pet. App. A37–A39).[5]

a) We have no quarrel with the general proposition that governmental action should not discriminate in favor of or against one or all religions. We are dealing here, however, with a special and unusual situation. The religious use of peyote by Indians has a history going back at least 400 years. See *People* v. *Woody*, 61 Cal. 2d 716, 720, 394 P. 2d 813, 817. The Native American Church is an American Indian tribal religion, with membership limited to Indians. Peyote has, moreover, a unique role in the religion of the Native American Church: "It is essential to their religion; it is a deity; it is a subject of worship as well as an instrument of worship and without it, the religion would cease to exist and could not function" (Specialized Finding of Fact 23, Pet. App. A26). These factors justify a special exemption for

[5] The majority in the court of appeals, on the other hand, found that the distinction was constitutionally impermissible on substantive due process grounds; but it affirmed the denial of the exemption because it held that classifying the Church of the Awakening with the Native American Church as both entitled to exemptions would continue, by its exclusion of others who might have a religious basis for peyote use, to be constitutionally infirm (Pet. App. A37).

peyote use in the religious ceremonies of the Native American Church that is not made available to others.

b) The legal treatment of Indians has long been recognized as being different in significant respects from that of other persons. See *United States* v. *Kagama*, 118 U.S. 375, 381–382; *Maryland Cas. Co.* v. *Citizens Nat'l Bank*, 361 F. 2d 517, 520 (C.A. 5); *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131, 133–134 (C.A. 10); 25 U.S.C. 1–1341; 18 U.S.C. 1151–1165. Thus, for example, Indians may have immunity from fishing license fees not afforded other citizens. (*Tulee* v. *Washington*, 315 U.S. 681); immunity from state taxation with regard to income earned on a reservation (see Brief for the United States as Amicus Curiae in *McClanahan* v. *Arizona State Tax Commission*, No. 71–834; compare Memorandum for the United States as Amicus Curiae in *Kahn* v. *Arizona State Tax Commission*, No. 71–1263); or even subjection to lower penalties than a non-Indian for the same criminal offense (18 U.S.C. 1153; *Gray* v. *United States*, 394 F. 2d 96, certiorari denied, 393 U.S. 985). Such distinctions hold true in the area of religion as well, where Congress has shown a particular regard for tribal autonomy. While the Indian Bill of Rights prohibits tribes from interfering with the free exercise of religion. (25 U.S.C. 1302(1)), it contains no clause prohibiting establishment of religion—an omission reflecting congressional fear that an "establishment clause" would lead to disintegration of the theocratic tribes. See Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343, 1364–1365.

c) The long history of religious use of peyote by Indians reinforces the validity of providing a special exemption for the Native American Church, much as the history of the Amish religion warranted an exemption from state compulsory education laws in *Wisconsin* v. *Yoder,* 406 U.S. 205, 215–219; cf. *Walz* v. *Tax Commission,* 397 U.S. 664, 676–680. No similar historical considerations reinforce petitioners' claim for an exemption.

d) Finally, the centrality of peyote use to the very existence of the Native American Church—an importance it does not have for the Church of the Awakening, for whose members it is merely one of several means for facilitating the religious experience—lends further support to the reasonableness of the distinction drawn by the Director. The principles enunciated in *Sherbert* v. *Verner, supra,* compel a balancing between the governmental interest in regulation and the individual interest in conduct asserted to involve a religious exercise. Where the latter interest is of such overwhelming importance that the continuation of a religion that has existed in one form or another for hundreds of years is at stake, it is a factor that may constitutionally be considered. The absence of such an interest in this case justified rejection of petitioners' application.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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